

5M, INC.

IBLA 87-718

Decided June 22, 1989

Appeal from a decision of the Utah State Office, Bureau of Land Management, disapproving assignments of coal leases U-098784, U-798785, U-0103107, U-0103109, U-0103129, U-0103130, U-0105418, and U-0149373.

Affirmed.

1. Attorneys -- Coal Leases and Permits: Applications -- Notice:
Generally -- Rules of Practice: Generally -- Words and Phrases

"Last address of record." In the processing of an application for assignment of a coal lease, the last address of record for the purposes of 43 CFR 1810.2(b) is the address stated on the application unless the applicant or an authorized representative has filed written notice of a change of address. When an application is accompanied by a letter from the applicant's attorney which states that the attorney is to be contacted concerning certain matters, the attorney's address is the "last address of record," and delivery of a document to that address constitutes service of the document upon the applicant, regardless of whether it was actually received by the attorney. Where the address provided by the attorney does not specify a suite, office number, or floor, "delivery" of the document is accomplished when it is received in the building indicated in the address.

APPEARANCES: Jerry Glazier, President, 5M, Inc., Hurricane, Utah; Richard B. Johns, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

5M, Inc. (5M), has appealed from the July 6, 1987, decision of the Utah State Office, Bureau of Land Management (BLM), disapproving assignments of coal leases U-098784, U-098785, U-0103107, U-0103109, U-0103129, U-0103130, U-0105418, and U-0149373. 1/ An application for approval of

1/ Separate notices of appeal and statement of reasons were filed by Jerry Glazier, President, 5M, Inc., Hurricane, Utah, and by Richard B. Johns, Esq., Jones, Waldo, Holbrook & McDonough, St. George, Utah, and Salt Lake City, Utah.

assignment of these coal leases from Consolidation Coal Company to appellant was filed on December 31, 1986. By letter dated January 14, 1987, and mailed via first class mail, BLM requested appellant to submit certain additional evidence. When no response was received, BLM, by decision dated April 27, 1987, and transmitted via certified mail, advised appellant that other evidence was required and allowed 30 days from appellant's receipt of the decision in which to submit the evidence or to appeal. 2/ No evidence was submitted timely, and BLM issued its July 6 decision disapproving the assignments.

5M asserts that it never received either BLM's January 14, 1987, letter or its decision of April 27, 1987. 5M's attorneys asserts that their law firm, Jones, Waldo, Holbrook & McDonough, "has no record of receiving the letter purportedly dated January 14, 1987," and that it appears that the April 27, 1987, decision letter "was not delivered to either 5M, Inc. or to the firm of Jones, Waldo, Holbrook & McDonough."

2/ Appellant also asserts that the Apr. 27, 1987, letter improperly imposed an appeal period for an interlocutory matter not ripe for appeal. The letter provided "30 days from receipt of this decision are allowed in which to submit the evidence required or to appeal." Inasmuch as BLM issued the July 6 decision which provided for an appeal, the relevance of this argument is not exactly clear. Nevertheless, appellant's assertion is correct. In Jean Emanuel Hatton, 107 IBLA 47, 55 n.2 (1989), we found that BLM had similarly misapplied the appeal requirement to an interim determination:

"It is established that, where (as in this case) BLM issues a decision holding an application or claim for rejection because of some deficiency, but allowing a stated period of time within which such deficiency might be corrected, there is, nevertheless, a right of appeal to this Board. Robert C. LeFaivre, [95 IBLA 26,] 27-28 [(1986)]; Beard Oil Co., [97 IBLA 66,] 67-68 [(1987)]; Randall J. Gerlach, 90 IBLA 338, 339 (1986); Carl Gerard, [70 IBLA 343, 346 (1983)]; see 43 CFR 4.410. In such cases, the 30-day period under 43 CFR 4.411(a) for filing a notice of appeal commences at the expiration of the compliance period. *Id.* Thus, directly contrary to the statement in BLM's decision, any appeal was required to be filed after the 30-day period.

"This is because, where a BLM decision contemplates that invalidation of a claim will not occur until the compliance period expires, the decision is merely an interim determination affording a party an opportunity to correct a problem prior to cancellation of his interest. The decision is interlocutory, that is, the party is not adversely affected (and therefore may not file an appeal) until the interest is actually canceled. The interest is not canceled until the compliance period expires, at which time the cancellation is then subject to review by this Board. Contrary to BLM's decision, it is not final for the Department at that point." (Emphasis in original.)

5M and its attorney correctly state that BLM did not address the January 14 or April 27 letters to the address indicated on 5M's application. However, the apparent reason for this is that in the cover letter for 5M's application, its attorney expressly instructed BLM as follows: "Please respond to me with any questions or concerns that you may have, as well as any further data that is necessary to be provided." Pursuant to this instruction, BLM sent the January 14 and April 27 letters to "5M, Inc.[,] c/o Jones, Waldo, Holbrook, and McDonough[,], One South Main Street[,], St. George, Utah 84770." 3/

[1] By so doing, BLM complied with the requirement to communicate with appellant at its "last address of record." Compare United States v. Mine Development Corp., 27 IBLA 238, 243 (1976) (holding that, in proceedings before the Office of Hearings and Appeals, service upon the attorney of a party constitutes service upon the party itself under 43 CFR 4.22).

Departmental regulation 43 CFR 1810.2(b) sets out the rule for constructive service of documents mailed by BLM:

(b) Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. [Emphasis added.]

In a case involving an oil and gas lease application, we held that BLM is required to use the address stated on the application unless the applicant or a duly authorized agent has filed written notice of a change of address. Victor M. Onet, Jr., 81 IBLA 144 (1984).

Appellant contends that even if the April 27, 1987, letter was properly addressed, it was not properly delivered. We disagree. Appellant's attorney explains what happened to the April 27, 1987, letter:

The return postal receipt for the Decision letter * * * indicates that this letter was delivered on April 29, 1987 to an

3/ Our conclusion regarding BLM's decision of Apr. 27, 1987, is based on the inside address of the decision letter and the address as set out under the space on the green Domestic Return Receipt Card (PS Form 3811, Feb. 1986) under "3. Article Addressed to:_____." Our conclusion regarding the letter of Jan. 14, 1987, is based on the inside address of the letter, which contains two insignificant variations from that used on the Apr. 27, 1987, decision, to-wit: the addressee is described as "5M, Incorporated," and the city, state, and zip code are described as "St. George, UT 84770."

"agent" of 5M, Inc. The signature of the purported agent appears to be that of one Mary Simmons. Our inquiry indicates that Mary Simmons was employed at the time by Dixie State Bank. During the entire period in question, Dixie State Bank was located on the ground floor of the building located at One South Main Street. The law firm of Jones, Waldo, Holbrook & McDonough was located upstairs in the same building.

Thus, there is no doubt that the letter was received at the address specified by appellant's attorney. Under 43 CFR 1810.2(b), delivery at the last address of record is adequate to establish constructive notice even if it is not in fact received by the addressee. Lawrence E. Welsh, Jr., 91 IBLA 324 (1986); Martha P. Merrill, 44 IBLA 136, 138 (1979), and cases cited. Application of this provision here works no injustice, as, if the letter was not delivered to the specific offices of the firm of Jones, Waldo, Holbrook & McDonough, the fault for this failure must rest with appellant, as it failed to provide a floor or suite number for these offices.

In any event, we are not persuaded that 5M's attorneys did not have actual notice of the demand for additional documentation. We note initially, that it strains credulity that two separate mailings sent weeks apart would both go astray. There is no evidence that the January 14, 1987, letter was returned to BLM as undeliverable. The April 27, 1987, decision was clearly received in the building occupied by 5M's attorneys, although not by one of their employees. In these circumstances, there is a presumption of regularity establishing that mailing of these documents was properly carried out, and the burden is on appellant, as the party asserting misdelivery, to show otherwise.

The affidavit of 5M's attorney does not expressly state that he was not aware of these letters; it states that his firm "has no record of receiving" these letters. While the affidavit of Jerry Glazier of 5M is crystal clear that 5M "never received" the documents (which is not surprising, as BLM did not mail these letters to 5M), the affidavit of Timothy B. Anderson, by comparison, makes no such assertion. Further, no statement has been offered from Mary Simmons to explain what she did with the April 27, 1987, decision, although such explanation would have greatly facilitated a conclusion that 5M's attorneys did not in fact receive the decision. Finally, the record shows that a William D. Darden, putatively representing the Salt Lake City office of Jones, Waldo, Holbrook & McDonough, examined case files for five of the leases involved herein in the BLM State Office on April 28, 1987, 1 day after the decision was issued. At this time, copies of the decision (which addressed all of the leases involved) would almost certainly have been in the record. In these circumstances, we are unable to conclude that 5M's attorneys did not in fact receive the two letters mailed to them by BLM in January and April 1987.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

David L. Hughes
Administrative Judge

I concur:

James L. Burski
Administrative Judge

